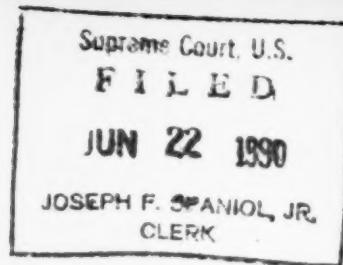


(4)

No. 89-1868



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN CALLEN,

Respondent,

v.

OULO O/Y and OY FINNLINES, Ltd.,

Petitioners.

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

REPLY BRIEF

Carl D. Buchholz, III

RAWLE & HENDERSON

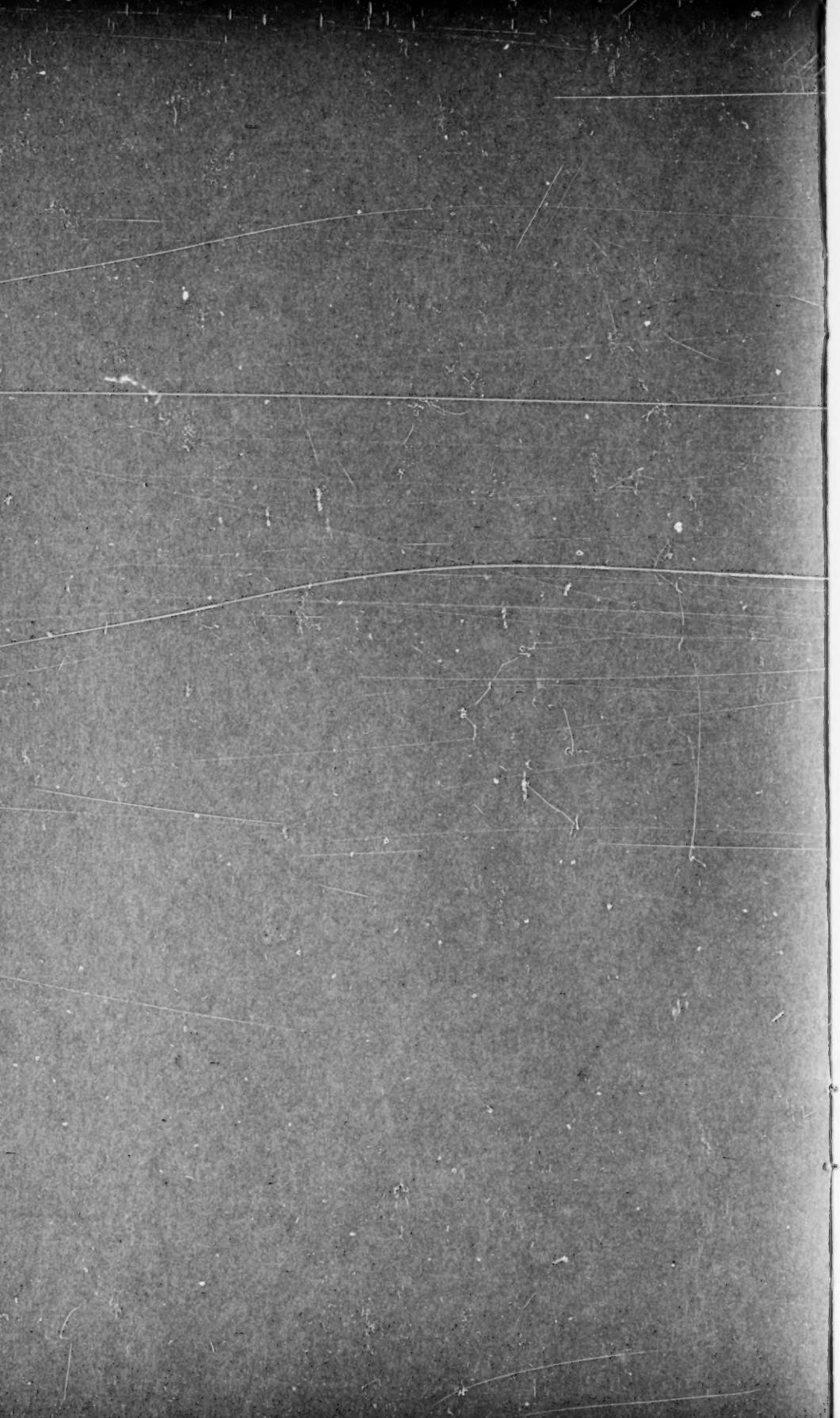
Attorneys for Petitioners,

Oulo O/Y and OY Finnlines, Ltd.

211 South Broad Street

Philadelphia, PA 19107

(215) 875-4000



No. 89-1868

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN CALLEN,

Respondent,

v.

OULO O/Y and OY FINNLINES, Ltd.,

Petitioners.

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

REPLY BRIEF

Respondent's Brief simply does not address the error of the lower court's holding. The lower court erred in holding that the shipowner did not discharge its duty to the plaintiff-longshoreman by notifying plaintiff's employer, the stevedore, of the "hidden defect"; rather, the lower court held that the shipowner had a continuing duty to supervise the stevedore's operation to ensure that there was "actual neutralization" of the alleged hazard. (10a). It is this holding of the lower court, i.e., requiring the shipowner to supervise the conduct of the stevedore, that is in direct conflict with This Court's decision in *Scindia* and the Ninth Circuit's decision in *Bjaranson*.

Petitioners admitted in their Petition that the shipowner has a duty to intervene in the stevedore's operation when: (1) the stevedore is proceeding in an obviously improvident manner; and (2) the shipowner knew that the stevedore was proceeding in such an obviously improvident manner. (See page 12 of Petitioners' Brief.) However, the duty to intervene is not applicable to the instant case because there was no evidence that the crew had knowledge that the stevedore was proceeding in an improvident manner. By imposing liability in this case, where there was no evidence that the shipowner had any knowledge that the stevedore was proceeding improvidently, the lower court has imposed a duty on the shipowner to oversee the stevedore's operation for any "obviously improvident" conduct. This Court rejected any such duty in *Scindia*.

Likewise, Petitioners never claimed that the ladder built into the tween deck was an open and obvious condition: the ladder had admittedly been covered with brown paper by the loading stevedore. However, once the lower court found that the shipowner had met its initial duty of warning the stevedore of the presence of the ladder under the paper (7a), and it was undisputed that this warning had proved adequate as far as the shipowner knew for the preceding 10-15 years, it was error for the lower court to impose any further duty on the shipowner without evidence that the shipowner had actual knowledge that the stevedore was proceeding in an "obviously improvident" manner. The lower court made no such finding of actual knowledge.

Under the lower court's holding, and Respondent's interpretation of the law, the shipowner in *Scindia* would have been held liable simply because of the existence of a defective winch, even if it had no actual knowledge that the longshoremen were continuing to use the malfunctioning winch and that use of the malfunctioning winch was obviously improvident. The mere existence of the defect, even if the shipowner had

warned the stevedore, would have been sufficient to impose liability under the lower court's holding in the instant case.

Also, under the holding of the lower court, and Respondent's interpretation of the law, the shipowner would have been liable in *Bjaranson* simply because it knew that the coaming ladder lacked adequate hand rails; the fact that the shipowner warned the stevedore of this fact would not have been sufficient to discharge its duty of "actual neutralization" of the alleged hazard. Such a duty is clearly contrary to the Ninth Circuit's holding in *Bjaranson*, as well as This Court's holding in *Scindia*.

As a final note, Petitioners suggest that footnote 3 of Respondent's Brief is in error. Petitioners believe the excerpt from the *Scindia* decision quoted at pages 8-9 of Petitioners' Brief is indeed the Supreme Court's holding with regard to the shipowner's duty prior to turning the vessel over to the stevedore; it is not a statement of "what the shipowner in *Scindia* 'conceded' the shipowner's duty of care to be", as Respondent asserts. If Petitioners' interpretation of this excerpt in *Scindia* is correct, then it is readily apparent that the holding of the lower court in this case, requiring the shipowner to not only warn of hidden dangers but also to "neutralize" those conditions for the stevedore, is in direct conflict with the Supreme Court's statement of the law in *Scindia*.

Respectfully submitted,

Carl D. Buchholz, III
RAWLE & HENDERSON
Attorneys for Petitioners,
Oulo O/Y and OY Finnlines, Ltd.
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000